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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF
ENGINEERS; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

1. The government **concedes** Respondents' jurisdiction to regulate the normal farming activity of deep plowing[1] under Clean Water Act ("CWA") § 404 depends on the statutorily-required element of "**addition**" of a pollutant to navigable waters. Opp. Br. 10. Yet it pays mere lip service to this requirement, and cites only cases involving different issues and activities *vastly different* from deep plowing. In its discussion of *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), the government focuses wholly on the word "pollutant" and ignores the word "added." Opp. Br. 10. Rather than normal farming activities, *Deaton* involved "sidecasting" from backhoe dredging of a drainage ditch to drain wetlands for residential development. *United States v. Deaton, supra*, 209 F.3d at 333-336. Deep plowing, unlike "sidecasting" with a mechanized backhoe shovel, does not collect, hold and transport or convey large quantities of earth to a completely different location. Similarly, *Rybachek's* in-stream placer mining involved *extraction, removal* and *processing* of raw materials from a stream bed, and the later return of processed overburden to a different spot in the stream – activities qualitatively different than turning native farm soil in place. *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990).

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[1] Deep plowing, or "deep ripping," is a normal farming activity. See, e.g., Brief *Amicus Curiae* of the American Farm Bureau Federation In Support of Petitioners at 15-17; Brief Amicus Curiae of California Farm Bureau Federation, California Cattlemen's Association, and Pacific Legal Foundation In Support of Petition for a Writ of Certiorari at 2 ("California is home to eight of the top ten United States farm counties and in every single one of them deep plowing is a long practiced, normal farming activity.").

Nor is deep plowing is more analogous to the land clearing activities in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) – *earthmoving, excavation* and *ditching* with engaged bulldozer blades and shovels, *id.* at 901, 920-921, 926-927 – than it is to the "incidental fallback" of native materials in *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).[2] When the government's cases are fairly examined in light of what was "added" in each, it is clear that plowing is far more similar to *National Mining*'s unregulated incidental fallback than to any activities ever held regulated under CWA § 404 prior to this case.

The government essentially concedes the term "addition" cannot be stretched to cover movement of soil in place when it endorses the Ninth Circuit's new "effects" test, i.e., that "deep ripping does not involve mere incidental fallback but *constitutes environmental damage sufficient to constitute a regulable deposit* [sic]." Opp. Br. 11, emph. added.[3] First, "sufficient environmental damage" is *not* the test for CWA § 404 jurisdiction; rather, "**addition**" of a pollutant is the test. *See* Pet. at 18; fn. 3, ante; NAHB Amicus Br. at 5-7. Under the Ninth Circuit's new judicially-legislated and subjective standard of sufficient "environmental damage," no farming activity altering the natural environment in any way would be exempt. It is no wonder amici American Farm Bureau Federation, California Farm Bureau Federation and California Cattlemen's Association are so concerned.[4]

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[2] Deep plowing does not even involve dredging or excavation. See, e.g., Brief of Amicus Curiae National Association of Home Builders in Support of Petitioners, at 8-10.

[3] The Ninth Circuit's opinion actually referred to "a regulable redeposit," signifying that soil had simply been turned in place. *See* Pet. App. 8, n.2, partial emph. added.

[4] The Ninth Circuit's decision "is devastatingly incompatible with the day to day needs of normal farming operations." CFBF, CCA and PLF Amicus Br. at 1. "Many CCA members are terrified that their ability to continue to graze and grow crops on their lands, indeed their very right to maintain viable agricultural operations, will be seriously undermined if the common activity of deep plowing in these areas may not go forward without a permit from the federal bureaucrats." *Id.* at 3-4. "[T]he Ninth Circuit's decision . . . result[s] in expansive, intrusive and overreaching federal regulatory authority over normal farming and ranching activities which Congress never intended to regulate at all under the CWA." AFBF Amicus Br. at 4.

Second, the government's reference to "factual findings" that plowing "moved" soil "both horizontally and vertically" misses the point. *All* plowing has that characteristic,[5] and the "incidental fallback" over which the Corps has no CWA § 404 jurisdiction likewise consists of soil being moved around. But, like plowing, and unlike the activities in *Deaton, Rybachek* and *Avoyelles*, unregulated activities producing incidental fallback essentially move soil in place. The legal issue is whether such turning or movement of soil in place constitutes an "addition," and on that question there is a conflict among the circuit courts.

The government wrests from context dicta in *National Mining* that plowing "may [or may not] produce . . . actual discharges," Opp. Br. 12, without explanation of *how* plowing could produce "additions" of pollutants under CWA § 404. The government fails to explain its own **completely contrary assertions** in *National Mining* that plowing and other exempt farming activities produce ***nothing more than "incidental fallback."*** *National Mining, supra*, 145 F.3d at 1405; Pet. 18-19. There is no plausible distinction whereby incidental fallback is not an addition, but soil turned in place by plowing –

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[5] "Plowing" is the "breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). An activity cannot meet this definition and *not* "move" soil "vertically and horizontally."

expressly exempt by statute and regulation – is an addition. Perhaps the "intensely factual, case-by-case approach" advocated by the government for determining its jurisdiction, Opp. Br. 15, allows it to recharacterize the effects of plowing (or other normal farming activities) as either "incidental fallback" or an "addition" of pollutants on a case-by-case basis, according to regulatory whim. Firmer legal ground for federal regulation is warranted and required by the CWA.

2. The government concedes the discharge must come from a "point source" and tacitly concedes no prior case has ever held a *plow* is a "point source," but sidesteps the real issue by adopting the Ninth Circuit majority's illogical position that the "point sources" here were the "bulldozers and tractors *pulling* [deep ripping plows]." Opp. Br. 12, emph. added. All plows are pulled by tractors, the modern mechanical successors to horses and oxen. Yet tractors are not "confined and discrete conveyances" or "point sources" in and of themselves, in abstraction from and without reference to the nature of their attachments which actually work the soil. It is undisputed the tractors here did not operate as bulldozers, with engaged shovels or grading blades. They simply pulled deep *plows* which broke up, cut, stirred and turned over soil in place – quintessential *plowing*. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4).

The courts have *not* "uniformly held that *such* earthmoving equipment [i.e., tractors pulling plows] may constitute point sources." Opp. Br. 12, emph. added; *see* Pet. 20-21. The government's statement that *Akers* involved "rippers" is **false**. Cf. Opp. Br. 12 with *United States v. Akers*, 785 F.2d 814, 817-820 (9th Cir. 1986).[6] Each of the other "point source"

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[6] *Akers* involved "extensive [*dike building,*] *grading, leveling, drainage* and *water diversion* to convert [2,889 acres of] wetlands to farmland suitable for growing upland crops." *Id.* at 816-817. The Ninth Circuit there *refused* to endorse the government's extreme argument that "discing of soil" by a tractor pulling discs constituted a "point source" of pollutants. *Id.* at 820; *see also id.* at 819.

cases it cites is also distinguishable with respect to both the regulated equipment and activities involved.[7] Respondents' inaccurate characterization of the cases fails to support their assertion that a plow can be a point source.

3. Petitioners disagree with the government's unwarranted inference that the very existence of the CWA § 404(f)(1) farmer exemptions means Congress believed plowing produced "discharges." This untenable position ignores that the *National Mining* court, in addressing the farmer exemptions, was "reluctant to draw any inference other than that Congress emphatically did not want the law to impede these bucolic pursuits." *National Mining, supra*, 145 F.3d at 1405.[8]

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[7] *See Avoyelles, supra*, 715 F.2d at 926 (landowner cut timber and vegetation with bulldozers with *shearing blades, pushed,* burned, raked and disced *materials into land's low spots to raise and level it,* and *dug a drainage ditch to fill and dry out* a swampy Louisiana floodplain to farm soybeans); *In re Alameda County Assessor's Parcel*, 672 F.Supp. 1278, 1281 (N.D. Cal. 1987) (*"graders* and a bulldozer" were used "to *spread earthen fill . . . brought onto* the property and *dumped* from *large earthmoving trailer trucks"*); *United States v. Larkins*, 657 F.Supp. 76, 85 (W.D. Ky. 1987) (involving "use of *earthmoving equipment* to *construct earthen dikes and levees* on wetlands"); *U.S. v. Larkins*, 852 F.2d 189, 190 (6th Cir. 1988) on 10-12 acres covered with knee-deep water, *Larkins'* defendants *"dug drainage ditches, cut timber, blasted beaver dams, and began filling low spots."*), emph. added.

[8] It also ignores and contradicts the history of its own regulations and interpretations showing plowing has always been treated as an *exclusion* from the CWA because it is not a "discharge," and that the 1977 statutory *exemptions* were merely intended to *emphatically clarify* this *exclusion*. AFBF Amicus Br. At 10-15. As stated by EPA Administrator Russell Train to the Corps' Chief in 1975: "[T]he primary concern of section 404 is to

The government's position that the farmer exemptions are "not available if the plowing at issue alters the hydrological regime of protected waters[,]" Opp. Br. 13, contradicts the statute's plain language, which requires **two** elements for "recapture": (1) the otherwise exempt "discharge" must be incidental to an activity intended to bring an area into a use to which it was not previously subject, **and** (2) "navigable waters" must be impaired in circulation or reduced in reach. 33 U.S.C. § 1344(f)(2). Plowing is a normal farming activity intended to prepare soil for planting crops, not to render "waters" amenable to previously unavailable "upland" farming. 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). By reading the first recapture requirement out of the statute, the government eviscerates the exemptions. Since **all farming** – and **all plowing** – changes the land's hydrology, Pet. App. 19, **there is no farming activity that will not come within the Corps' permitting authority under the government's interpretation.** Such a vast extension of the Corps' powers over traditionally local farming activities is wholly illegitimate given the statutory language and Congressional intent. The cases saying the provision should be construed narrowly merely meant to prevent its extension to activities beyond the expressly enumerated "normal farming activities," not to strike it from the statute entirely. Under the government's view, the farmer exemptions are a mere "grandfather clause" and offer no meaningful protection because they would not apply to any farmer who did anything to change a wetland's hydrology. Pet. 24.[9] This is emphatically *not* what Congress intended. *National Mining, supra,* 145 F.3d at 1405; Pet. 21-27.

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address situations where dredged or fill material is discharged into wetland areas. **By no stretch of the imagination can the simple act of plowing be considered to fall under that category.**" *Id.* at 11, emph. added.

[9] "Wetlands," of course, is not an objective or fixed concept. Lands formerly considered "drylands" or "uplands" when Congress passed the 1977 CWA farmer exemptions may now be classified as "wetlands" due to the ever-changing regulations adopted by Respondents to define their own jurisdiction. CFBF et al., Amicus Br. at 9-10, & fn. 25; AFBF Amicus Br. at 3 ("the wetland evolution for nearly three decades [has] . . . take[n] on a life of its own as it marched relentless up the hill consuming ever-dryer land.").

Petitioners do *not* raise "fact-based challenges" to the conclusion that farming grapes or orchards is a "different" agricultural use than growing forage and ranching cattle. Of course it is. But it is also undisputed that both types of activity are *agricultural* uses, and that the ranchland pastures on Borden Ranch *were always subject to normal farming and plowing in their natural state,* without need of any other, more primary activity designed to convert previously unfarmable wetlands into farmable drylands. In other words, the plowing involved here was *not* merely "incidental" to some other activity or activities actually designed to convert extensive or significant wetlands to drylands, such as occurred in *Deaton, Akers, Avoyelles,* and *Larkins.* Rather, plowing was *the primary activity* occurring at Borden Ranch. The Ninth Circuit majority now grants Respondents legal authority to regulate *this* normal farming activity – plowing – *alone* and *in isolation,* a ruling wholly inconsistent with Congress' intent to provide meaningful farmer exemptions.[10]

4. Regardless of the district court's incorrect reference to an "apparent[ ] agree[ment]," Petitioners *never agreed* each deep plow pass constituted a separate violation. In calculating the penalty, the district court gave no consideration to the number of days on which discharges occurred other than to state the obvious: it would not

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[10] *See, e.g., In re Carsten,* 211 B.R. 719, 732-735 (Bkrtcy. D. Mont. 1997) (recapture provision addresses extensive conversion of unproductive wetlands to drylands on significant scale, not minor conversions of small areas of marginal waters to uplands).

assess multiple daily penalties for each separate plow pass. Pet. App. 102-103. The government ignores that each of the 358 "violations" for which the maximum $25,000 daily penalty was imposed (in the initial "top-down" calculation) was of the *same type*.[11] The Ninth Circuit majority recognized this fact made its penalty holding problematic, Pet. App. 14-15, because the cases it cited imposed multiple penalties for "separate" violations on the same day *only where the violations are in different and distinct categories*. Pet. 28.

The government incorrectly contends *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *vac. and rem. on other gds.*, 484 U.S. 49, is irrelevant because it discusses a prior version of CWA § 309(d). In fact, *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) held Congress' 1987 amendment to CWA § 309(d) (33 U.S.C. § 1319(d)), to which Respondents refer, was "intended to ***clarify*** that each ***distinct*** violation is subject to a separate ***daily*** penalty assessment of up to $25,000 . . . ." *Id.* at 1139, add'l emph. added, quoting H.R. Rep. No. 99-1004, 99th Cong., 2d Sess. 132.

The Ninth Circuit majority admitted its approach was not "free from difficulty," but read the "per day" language out of the statute because of supposed "incentive problems." Pet. App. 15. Such an approach is arbitrary. If each plow has multiple shanks, why not assess a separate penalty for each individual furrow created on each pass? And if each furrow pass is a separate daily violation, why not each foot, or each inch thereof? Nor is this arbitrary interpretation of § 1319(d) supported by otherwise "irrational results" or the "policy goal of discouraging pollution." Pet. App. 15. It presupposes a *knowing* violator and

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[11] All violations found here were concededly within the same category. Pet. 29; Pet. App. 15.

fails to apprehend such violators are subject to *substantial additional criminal penalties* under the CWA, including first-time fines up to $50,000 per day and three years imprisonment, see § 1319(c)(2) – clearly significant deterrents to *intentional* conduct.[12] Since § 1319(c)'s criminal penalty provisions allay alleged "incentive" concerns, such concerns cannot support the Ninth Circuit's arbitrary interpretation of § 1319(d)'s *civil* penalty provision.

5. The government's brief contains **irrelevant** and **inaccurate** factual characterizations designed to prejudice this Court and falsely imply this case does not raise significant legal issues. Petitioners briefly address some misstatements, only for the sake of the record. The government refers to Mr. Tsakopoulos' testimony concerning his understanding of Corps guidance given at a single September 1994 meeting *regarding vernal pools*, which the district court found "not veracious." Opp. Br. 4, 5 & n.1, 6 & n.2. The court found CWA violations in only **one** of six vernal pools where the government charged violations, and **that** finding was **reversed by the Ninth Circuit**. Vernal pools are no longer involved in this case at all, Pet. App. 10-11, and Petitioners in no way rely on any such evidence.

The government claims the district court's findings do not support Petitioners' statement that Tsakopoulos tried to plow in accordance with the Corps' guidance to avoid needing a § 404 permit. Opp. Br. 6 & n.2. Yet the district court itself, in a related case, expressly stated of this action: **"Tsakopoulos was found to have made efforts, albeit unsuccessfully, to avoid jurisdictional waters so that he**

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[12] Tsakopoulos' violations were **neither alleged by the government nor found by the district court to be intentional**. Pet. App. 143-144.

could avoid the necessity of obtaining a permit from the government." Pet. App. 144, emph. added.[13]

The transparent purpose of the government's lengthy, inaccurate, and irrelevant recitation of "facts" is to buttress its meritless assertion that the Ninth Circuit's "fact-specific decision does not raise any issue of exceptional importance[.]" Petitioners and their numerous amici disagree, for reasons stated in their briefs. The extreme lengths to which the government has gone to raise and mischaracterize irrelevant facts merely underscores the weakness of its legal position. Respondents' unauthorized conduct, both in litigation and in the CWA regulatory arena, will continue – to the severe detriment of farmers and ranchers nationwide – unless this Court grants certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 7, 2002

Respectfully submitted,

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[13] The government's reference to testimony of EPA investigators who supposedly saw "fully-engaged rippers at work in jurisdictional wetlands" in April 1997 on Borden Ranch, Opp. Br. 6, is also irrelevant. The district court ***expressly found the cited evidence was insufficient to support any finding of CWA violations*** and thus did not impose civil penalties for any conduct after January 1997. Pet. App. 103-104.